

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

**NEW YORK STATE RESTAURANT
ASSOCIATION,**

Plaintiff,

- against -

**NEW YORK CITY BOARD OF HEALTH,
NEW YORK CITY DEPARTMENT OF HEALTH
AND MENTAL HYGIENE, and Thomas R. Frieden,
In His Official Capacity as Commissioner
of the New York City Department of Health
and Mental Hygiene,**

Defendants.

No. 2008 Civ. _____

**DECLARATION OF
HECTOR A. MUÑOZ**

HECTOR A MUÑOZ hereby declares under penalty of perjury as follows:

1. I have been an employee of Burger King Corporation ("BKC") for more than eight years. BKC is a member of the New York State Restaurant Association. For the last two years, I have held the position of Senior Director of Marketing Impact, National Restaurant Merchandising for BKC. I manage all aspects of BKC's merchandising efforts, including its promotion of food products through store window signs, outdoor signs, restaurant menu boards and food packaging. Previously, I worked for six years at the field market capacity, in various roles across the country.
2. One of my primary responsibilities as head of marketing and merchandising is to understand how most effectively to communicate BKC's message to our customers at the restaurant level, and how changes in our methods of communicating information to customers – whether it be about promotions, product choices or nutritional information – can

affect customers' buying decisions. BKC communicates to customers in a number of ways, including through the media, signage, both inside and outside the store, and menu boards.

3. The menu board is the single most valued piece of real estate in a Burger King® restaurant. It is the most important way we communicate with our customers in the store about the products we offer and their price; it is what our customers look at, and it is what stimulates their decision to buy. To be effective, our menu board must (1) list our main menu items; (2) be easily read, (3) be easily understood, and (4) be quickly and easily ordered from. BKC has expended substantial resources to design and develop our menu boards so that they achieve these four objectives. That effort is ongoing. We are always trying to improve our menu boards.

4. Our menu boards consist of three types of food description inserts:
- Menu slats which are lines of text lettering identifying the menu item and its price;
 - Value meal "trans-lites" which are illuminated photographic images that feature fries and drinks along with the name of the item and the price; and
 - Promotional trans-lites which are illuminated photographic images of promotional food offerings, with their name and price.

The food description inserts are arranged on large menu board panels. While the breakfast meal is being served (until 10:30 a.m.), three menu board panels are displayed: the breakfast value meal trans lites panel on the left, the promotional trans lites panel in the center (both of which are stationary panels), and the menu slat panel on the right (which is a sliding panel). At 10:30 a.m., the menu slat panel is shifted to the left to cover the breakfast value meal trans lites panel and to reveal the value meal trans lites panel, which has lunch and dinner

offerings. Because space on menu boards is limited and so important to BKC, we carefully control its use and appearance. To keep clutter on menu boards at a minimum, BKC displays only the menu board panels listing the offerings that are being served during that part of the day. The drive-throughs apply the same method of displaying menu board panels, except that the menu slats panel rotates instead of slides to cover items not being offered.

5. Requiring BKC to place the calorie count for each menu item on the menu boards will create clutter and cause customer confusion. Addition of the calorie count information will increase significantly the amount of text on the menu board. In order to fit the calorie and price information, we will have to shrink the font size of the name and price of the food item, which will make the menu board more difficult for customers to read while they are standing in line or at the drive through. We have found that customers tend to finalize their food purchasing decisions before they reach the counter. Many customers will have difficulty reading the redesigned menu boards from their place in line. This will cause frustration. The smaller font size will also cause confusion as customers try to differentiate calorie and price numbers which will necessarily be squeezed together given the limited space on the slats and trans lites.

6. Based on my years of marketing and merchandising experience and my review of consumer research studies, I am aware that the more information that is crowded onto a menu board, the greater the degree of customer stress, which can affect buying decisions negatively. Customers want clearly organized, easy-to-read menu boards. With more clutter, a menu board becomes a "stressor" for customers in the order line, making them less likely to review the menu board when making a purchasing decision. Customers in quick service restaurants tend not to buy items they cannot see. Instead, customers will order food

products that they are already familiar with, frustrating BKC's efforts to introduce new food products and creating a negative dining experience.

7. An effective, easy-to-read menu board is essential to enable BKC to satisfy customers' quick-serve needs. From an operations perspective, we strive to avoid lengthy food ordering lines. Customers expect to spend only one to three minutes waiting in line to order. Failing to meet this goal can create customer dissatisfaction. At BKC, to minimize waiting time, our objective is to complete customer orders within 150 seconds. A well-organized, easily read menu board reduces the ordering line length by helping customers quickly select their meal choice and convey that choice to the cashier.

8. Focusing customer attention on caloric information on the menu board will lead to slower customer ordering and longer food ordering lines. Assuming customers will even consider caloric information at the point of purchase, accounting for caloric information while in the food-order line will delay decision-making. If customers pose questions to our restaurant employees about the calorie information – because they are unsure of the recommended daily caloric intake, confuse calories with another nutrient or confuse calories with item price – the buying decision will be delayed further.

9. This delay is of particular concern for our menu items that can be made to order for customers. BKC invites its customers to place specialized orders for many of our menu items, adding or subtracting ingredients from those menu items to create a “customized” meal. For example, a five ingredient sandwich may be ordered in more than 100 different ways. Customers may ask the Burger King® cashier for assistance to determine how modifying their selection will affect the calorie count of the menu item.

10. During a restaurant's busy lunch service, for example, these delays can accumulate, causing significantly longer food ordering lines and a loss of customers who refuse to wait in a long line. This puts us at a competitive disadvantage because the cornerstone of our business model is offering quick, convenient service and tasty meals. Requiring us to modify our menu boards in a way that significantly reduces their market appeal and causes delays in service will be detrimental to our business.

11. This delay is not necessary. BKC offers customers nutrition information about our menu items in a variety of ways. We place an easy-to-read nutrition poster near the food ordering area. Customers can consult the nutrition board before entering the order line. We have an interactive website that allows customers to plan a meal and tally up the number of calories as they go. We also offer brochures containing nutrition and health information in many of our restaurants and also provide such information to our customers through tray liners.

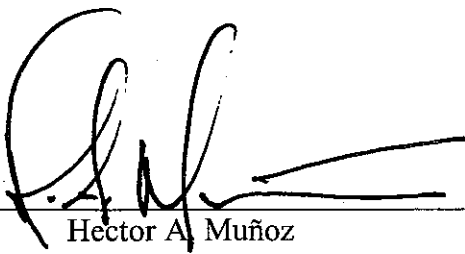
12. The earlier version of the New York regulation allowed restaurants to submit alternative proposals to menu board labeling to the City's Department of Health. BKC submitted a number of alternative proposals, including a menu board sign in stores notifying customers that "Nutritional Information Is Available On Request." We also offered to disclose nutrition information about our products on signs in front of the cash register, on stanchions at the start of the queue line or at the counter or on side walls. We proposed providing calorie information on in store counter mats, which would be located right at the point of purchase. We offered to use one or several of these methods of conveying nutrition information in combination. A copy of our proposal to the City is attached to this Declaration as Exhibit A. The Department of Health rejected all of BKC's in-store

proposals, stating inexplicably that they did not meet “the standard” of making calorie information available at the point of purchase.¹ A copy of the Health Department’s letter to Craig S. Prusher, Vice President, Government Relations, is attached to this Declaration as Exhibit B. The current version of Regulation 81.50 does not provide that restaurants may submit alternatives for consideration.

¹ The Department of Health did indicate that it would consider the stanchion design for drive through settings as long as it was placed along the drive through line before customers place their order. This alternative has been incorporated into the new Regulation 81.50.

I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true and correct.

Executed on January 25, 2008



Hector A. Muñoz